THE ELEMENTS OF THE 'ACTIO MANUTENTIONIS', TO WHAT EXTENT IS THIS ACTION AVAILABLE ALSO TO MERE DETENTORS?

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The 'actio manutentionis' is one of the four 'actiones possessoriae' which defend and protect possession both if it is joined and if it is separate from the right, defending possession against any person, and even against the owner himself. The rational basis behind them is the necessity of forbidding violence and arbitrary molestations against the possessor, and also in protecting public order where no one can take the law into one's own hands. This nature of public order was enunciated by the Court of Appeal in **Muscat versus Farrugia (1956) – Volume XL.II.897,** where the possessory action is founded on the necessity of social utility, rather than any absolute principle of justice, to prevent the private citizen from taking justice into his hands. In fact Galgano says:

"Si sogliono addurre, per giustificare questa protezione, superiore esigenze attinenti all'ordine pubblico: se chiunque potesse liberamente impossessarsi di çio che altri possiede senza esserne (o senza poter provare di esserne) proprietario, si legittimerebbero spoliazioni a catena, e l'ordine pubblico ne sarebbe gravemente pregiudicato". The inherent limitations in these possessory actions, being restricted to molestations and aggressions of possession, distinguish them from the 'actionis petitoriae' which can be exercised by persons having the right of ownership or other real rights over the thing against a usurper. In **Ersilia Zahra versus Aurelia Carabott (1955) – Volume XXXIX.I.315,** the Court of Appeal said that in the possessory judgement, it is only the 'jus possessionis' that is decided upon, and not the 'jus possedendi', without prejudice to the issue in the substantive actions.

The action for the maintenance of possession, together with the 'actio spolii' can be said to be the real possessory actions, because they can be exercised **only** by the possessor, who may be the owner, whereas the other two can be exercised **also** by the owner even if he is not the actual possessor. In Italy, the position seems to be similar where Galgano says:

"Le azioni possessorie spettano al possessore, anche se non proprietario, ma di esse puo avvalersi, e normalmente si avvale, anche il proprietario, che sia stato spogliato del possesso o molestato nel godimento del bene. In tal caso egli non agisce come proprietario ma come possessore;

e le azioni possessorie gli offrono una protezione assai più rapida di quella che otterrebbe con le azioni petitorie, essendo dispensato dall'onere della prova, spesso difficile, della proprieta del bene''.

Section 534 defines the actio manutentionis as:

''Where any person, being in possession, of whatever kind, of an immovable thing, or of a universitas of movables, is molested in such possession, he may, within one year from the molestation, demand that his possession be retained, provided he shall not have usurped such possession from the defendant by violence or clandestinely, nor obtained it from him precariously''.

This is a derivation from the 'interdictum uti possidetis' under Roman Law, where the plaintiff, being the molested possessor, exercises the action against the defendant who is the person causing the molestation. In France it is known as the complaint. The elements of this action may be said to be the conditions under which it can be exercised The 1st element is:

Being in Possession, of whatever kind

Possession is defined in Section 524 (1) as, **''the detention of a corporeal thing or the enjoyment of a right, the ownership of which may be acquired, and which a person holds or exercises as his own''.** The operative part is the latter, where one is not merely detaining, but possessing in terms of law as will be subsequently shown. Possession is a state of fact which is recognized and protected by law, inspite of its not being a right. We find its genesis in Roman Law where the praetor, in case of conflict as to who was in possession, issued the possessory interdict 'uti possidetis – vi. clam. precario ad adversario'. The person now in possession should not be molested unless he has gone into occupation through violence by any unlawful act, clandestinely, or by precarious title vis-a-vis his adversary, that is, as between the parties to the action.

The elements of possession are the material element, **corpus,** the fact, and the mental element, the **animus,** the intent. Savigny's subjective theory postulates the **animus domini,** the intent of holding as owner. Ihering's objective theory does not postulate such a high intent, it is merely that of keeping the thing to oneself to the exclusion of others, hence deriving its economic utility, provided there is no negative element.

Savigny –	Possession	=	Corpus + Animus
	Detention	=	Corpus + Animus detenendi
Ihering –	Possession	=	Corpus + Animus
	Detention	=	Corpus + Animus – negative element

Under the objective theory, both possession and detention have the same animus, but there exists the negative element in detention. This latter view seems to be closer to the Roman Law approach especially in protecting the

possession of the motive property devolving on the children born of a **matrimonium liberum.** As they were not her agnates, they could not inherit her, yet the praetor protected their possession. From the definition of possession under Section 524 (1), it seems that our law is closer to Ihering's approach. In his **Fonte,** Sir Adrian Dingli did not adopt the Italian concept because it applied to legitimate possession which was only necessary for prescription and because detention and possession were confused:

"Confondono la detenzione col possesso, il cui carettere principale è quello di tenere la cosa come propria".

Possession of whatever kind implies legitimate, illegitimate, in good faith and in bad faith. In **Azzopardi versus Farrugia (1930) Volume XXVII.I.622,** the Court of Appeal confirmed that:

"La differenza fra le due azione, è marcato, mentre quella di manutenzione è data per proteggere il possesso che possa essere turbato, ed anche eventualmente violato o distrutto, l'altro di reintegrazione viene fondata nel punire la violenza o la clandestinità dello spoglio"...."Il nostro legislatore, concede l'azione di manuntenzione *a qualunque possessore, sia esso legittimo o illegittimo, di buona o male fede, purché però la illegittimità, cioé la violenza, la clandestinità e la precarietà, non sia stata operata contro il convenuto,* il quale deve essere difeso come contro un ingiusto spogliatore".

Possession is legitimate if the elements of **iusta causa usucapionis** exist – Section 2107 (1): Civil Code:

Continuous, when the possessor has not willingly desisted from exercising acts of possession to which the thing is subject according to its kind. Thus, there has been no act of omission;

Uninterrupted, when not given up through an act either of the possessor himself or of a third party. There can be civil interruption by the possessor himself by acknowledging a right of ownership in another person, or natural or civil acts by a third party or by the owner. Natural interruption would be deprivation of possession for a term exceeding one year (Section 2127) whereas civil interruptions are measures laid down under Section 2128 to Section 2132 in favour of the owner to protect his right against prescription. If these acts are performed by a non-owner, possession remains uninterrupted.

Peaceful and Public, when possession has been acquired without physical or moral violence and by means of visible acts. These 'uitia' are relative to the person suffering them, because in terms of Section 527, initial violence and clandestinity do not perpetually nitiate possession as it can be recommenced when they have ceased.

Unequivocal. Possession is equivocal when through the conduct of the possessor and other circumstances, it is not clear that the possessor detains the thing as his own. In terms of Section 526, equivocal possession results also from the exercise of facultative rights or based on tolerance. Equivocal title

implies also a precarious title being relative to the person by whom possession has been so obtained. It is a permanent vitiation because it is to be found at all times. Any vitiation in any of the elements renders possession illegitimate and in certain instances turns it into detention or holding thus important with reference to the time required for prescription and also as regards the exercise of certain possessory actions.

It is a question of fact as to whether possession is in good faith or bad faith, but under Section 532, good faith is presumed, and the party alleging bad faith is bound to prove it. Good faith means the conviction, justified by probable grounds, which the possessor has, that the thing possessed by him is his or that the right which he exercises belongs to him. Section 531 (1) says that a person who, on probable grounds, believes that the thing he possesses is his own, is a possessor in good faith. A possessor in bad faith is the person who knows or who ought, from circumstances, to presume that the thing or right possessed by him, belongs to others – Section 531 (2). The legitimacy of possession is here not affected, it only affects the rights and obligations between the possessor and the owner and the time necessary for prescription – (Section 2140 – Section 2142).

In terms of what has been said above, it therefore appears that only the possessor, admittedly of whatever kind, can exercise the actio manutentionis, but in terms of the wording in 8004, there appears to be an inherent conflict because it depends on who the defendant is. In fact Section 534 continues, **"provided that he shall not have usurped such possession from the defendant by violence or clandestinely nor obtained it from him precariously".** This indicated the defences available to the defendant, however, the problem that arises is that it appears that in certain instances, where the above **vitia** do not exist vis-a-vis the defendant, simple holders or detentors may also exercise the **actio manutentionis.**

What does a precarious title mean? Does it mean precarium, that is, holding gratuitously at the pleasure of the owner, or does it mean also holding or detaining onerously or gratuitously in the name of another? In both instances, there is no possession as there is the negative element, or absence of animus. Indeed, the lessor may be an indirect possessor because he is holding through the lessee who, in terms of Section 524 (3) is a mere holder. If a person has begun to hold the thing in the name of another person, he cannot, in terms of Section 525 (2) detain in a different way, for the simple reason that he wishes so to do. In fact Section 525 (2) states that where a person has commenced his possession in the name of another person, he shall be presumed to possess upon the same title unless the contrary be proved.

It therefore appears that **"possession of whatever kind",** implies that precarious holders, detentors or holders do not fall within the legal meaning thereof, and therefore cannot exercise the actio manutentionis. Section 2118 as regards prescription states that persons who hold a thing in the name of others or the heirs of such persons, **cannot prescribe** in their own favour, such are tenants, depositaries, usufructuaries and generally, persons who hold the

thing not as their own. There are only three exceptions to the principle of the indelibility of the vitiation of precarium, or of detention found under Section 2119 and Section 2120 under the title of prescription.

These are:

(a) When the cause of the detention is changed by virtue of an exterior act of a third party, who transfers to the holder of the thing, the property thereof.

(b) When the cause of detention is changed by virtue of exterior oppositions made by the holder himself against the right of the owner. In this respect, Torrente says:

"Per mutare la detenzione in possesso è necessario un atto di opposizione contro il possessore; atto che, comunque esplicato, deve inequivocabilmente manifestare l'intenzione di tenere la cosa per proprio conto esclusivo".

This was also confirmed by the Corte di Cassazione in Italy in 1954.

(c) When the person who formerly held the thing in the name of another person alienates it in favour of a third party in virtue of a particular title capable of transferring ownership.

Dingli himself, commenting on his inclusion of the phrase under Section 2118 **"who hold a thing in the name of others"**, said that he did not use the words **"holding precariously"** because **"secondo la giurisprudenza Francese, queste parole significano ogni detenzione in nomi altrui, mentre secondo le nostre idee tolte dal diritto Romano, significano soltanto *una detenzione a piacere del proprietario".*** It therefore appears that the word 'precariously' under Section 534 has a very restricted meaning, that is, solely as defined under Section 1839.

Taking the above as a starting point, 'precarium' can never found possession, because there is absence of animus and the negative element. Furthermore, although lease which is usually onerous, usufruct and other titles do not fall under the definition of 'precarium', yet due to the definition and presumptions of possession, they are not possessors as they hold in the name of others, which is of wider application. This was confirmed in **Azzopardi versus Farrugia (1962) – Volume XLVI.I.381** where the Court held:

"Huma skond id-dritt modern, possessuri prelearji dawk li jkunu jgawdu minn xi dritt, anke ta' natura rrevokabbli, li ma jirrivertax assolutament lill-proprjetarju imma jimmantjenu fih id-dritt u li l-possessuri jridu bil-fors jirrispettaw".

In Appeal it was also held that even the emphyteuta and the usufructuary are precarious possessors but only as regards the rights of the direct and the bare owner respectively.

It is here where the inherent conflict appears. Section 534 starts by saying that only possessors of whatever kind can exercise the 'actio' yet its proviso states that the 'iritium' of precariousness shall operate only if the possessor,

being the plaintiff, had usurped possession from the defendant. The presumption under Section 525 (2) that one who has commenced his possession in the name of another person shall be presumed always to possess under the same title unless the contrary be proved, and the rule under Section 2121 (1) that no one can change in regard to himself the cause for which he holds the thing, reinforce the view that a detentor or holder always remain so. In **Grixti versus Ellul (1939) – Volume XXX.I.457** the Court of Appeal in this context said that it is evident that those who, as the usufructuary, hold precariously in the name of another, for the purpose of their precarious rights, it would be immoral, if **insciente domino,** they would invert their title and possess 'animo domini'. Zachar quoted in Dingli's Fonti says:

"La clandestinita e la violenza devono essere riguardo al convenuto per escludere l'azione possessoria, *ma la precarita è un vizio generale ed esclude sempre l'azione,* anchorche l'attore abbia avuto la cosa precariamente da un terzo".

This reasoning seems to be similar to Italian Law except for one exception where Galgano states:

"Per regola generale, al detentore non spetta invece l'azione di manutenzione, perciò il detentore dovrà rivolgersi al possessore perchè sia lui ad esercitare l'azione di manutenzione, se ha subito uno spoglio non violento o clandestino o se è stato solo molestato nella detenzione. La regola generale trova però una importante eccezione: il conduttore che sia stato da terzi molestato nel godimento della cosa può esercitare egli stesso l'azione di manutenzione, senza bisogno di rivolgersi al locatore".

Carbonnier is of the same opinion, **"enfin, le principe est qu'il ne peut (en matierè immobiliere) escercer les actions possessoires".** He continues that vis-a-vis the owner or from whom he holds precariously, the detentor does not need this possessory action because he is already adequately protected under the criminal code as regards violation of one's domicile or forced entrance and also by the terms of his own contract. With regard to molestation by a third party, the detentor can denounce to the owner / possessor, who may then in turn exercise the complaint. However, in certain instances, Carbonnier says that one can sometimes come across clauses where certain detentors are delegated with the power of making the complaint in the name of the possessor.

In so far as local jurisprudence is concerned, there have been cases where our courts have expressed their opinion that detentors cannot exercise the Actio Manutentionis. In **Azzopardi versus Farrugia (1930) – Volume XXVII.I.622** plaintiff was a tenant of some enclosed tenement, but he used to exercise a right of way over defendant's fields. The First Court held:

"L'azione possessoria non compete che all possessore di un fondo che tiene per sè ed in suo nome, e non compete al conduttore che tiene la cosa non per sè, ma in nome di altri, e quindi l'attore, che e conduttore, non può invocare in suo favore la disposizione di detto Art 229 (S 534) ..... La disposizione applicabile sarebbe quella contenuta nell'Articolo 230 (S 535)".

In Appeal, besides confirming the above, it was held that had the legislator wanted to include also detentors under Section 534, he could have included also the words **"or of the detention" which** are found under Section 535. **"Non intende riferirsi al possesso di fatto, *ma solamente di diritto".***

The above line of argument was also followed in **Mamo versus Camilleri (1962) – Volume XLVI.162** besides others. Here the Court of Appeal held that the action exercised by plaintiff was not the actio manutentionis, **"għassemplici raġuni illi l-attur hu biss kerrej tal-fond, cioè semplici detentur, mentri dik l-azzjoni tikkompeti biss lil min hu possessur fis-sens veru tal-Artikolu 561 (1)** (Now 524 (1)) [11]. The court gave the plaintiff an alternative remedy only because he left a discretion to the court so to do. Had plaintiff exercised the actio manutentionis only, the court would have thrown out his case.

From all the above, it therefore appears that before entering into the merits of the molestation to grant a remedy, the court must first enter into an examination as to whether the plaintiff is a possessor or not. However, in a 1967 judgment, **Vella versus Boldarini et – Volume LI.I.100** in my opinion, the Court of Appeal seems to have disregarded the above arguments and concentrated its findings on the proviso to Section 534 which has created a contradiction to what has been said before.

Plaintiff used to receive a percentage of rent on some premises in Senglea, but defendants unilaterally contested this right and therefore stopped paying her. Although defendants pleaded the precariousness of plaintiff's possession, because only her husband was the administrator, the court in refusing this line of argument, said that **ius terzi** cannot be pleaded. Quoting from a very early judgment (IX.291) it said:

"Non è lecito a chiunque, benchè munito di un titolo di proprietà *di molestare il possessore di un immobile anche con titolo precario,* a meno che l'attore non metta per base della sua istanza la domanda da provarsi di essere egli il proprietario della casa da altri posseduta".

In deciding in favour of plaintiff, the court did not go into the merits of what type of possession she had, and interrupted the legal position that the actio manutentionis cannot be exercised only if any of the 'vitia' already mentioned, exist vis-a-vis the defendant:

"Il-vizzju tal-prekarjetà jeskludi l-azzjoni biss meta jkun rigward il-konvenut u dan jirriżulta ċar mill-kliem *minn għandu"* (nor obtained it **from him** precariously).

To strengthen its reasoning, the court also quoted Sir A. Dingli in having suppressed the word 'legitimate' from the definition of possession, however, in my opinion, it appears that he was quoted wrongly, because 'legitimate' was not included for reasons already cited as regards the prescriptive period required. Admittedly, pleas of ownership are excluded in possessory actions, as their object is to maintain the status quo, but, in my opinion, the proviso to Section 534 should be read in the context of the whole section, and not on

its own. Therefore it appears that the court should have entered into the merits as to whether the plaintiff was a possessor or not.

There seemed to be a hint on the same line of reasoning in **Agius versus Cutajar (1959) – Volume XLIII.I.97.** Plaintiff was the owner and possessor of an alley in Zabbar and was molested by defendant. The Court of Appeal held that:

"Peress illi l-prova ta' dan l-element tmiss lill-attriċi, l-appellant issostni illi huma ma ppruvawx ebda element ta' pussess fuq l-isqaq in kwistjoni. *Iżda din il-pretenzjoni mhix ġustifikata.* Appena hemm bżonn jingħad illi anki jekk dan il-pussess tal-attriċi kien komuni, huwa kien l-istess manutenibbli galadarba l-konvenuta permezz tal-mandatarju tiegħu menomat l-eżerċizzju tiegħu b'att ta' molestija".

One may perhaps reconcile the apparent contradiction that, in spite of perhaps being able to exercise this possessory action, the detentor or holder only do so in the name of the possessor. In fact Section 524 (1) says that, **"a person may possess by means of another who holds the thing or exercises the right in the name of such person".** Nonetheless, as our courts are not bound by the doctrine of precedent, it still remains to be seen whether the argument posed in **Vella versus Boldarini** will be upheld in the future.

On the other hand, the actio spolii is granted also to the simple holder, even if the defendant is the owner of the thing which the plaintiff has been given under a precarious title, or whose possession is vitiated through violence or clandestinity. Except for dilatory pleas, the defendant, unlike under the actio manutentionis, cannot plead any of the above mentioned 'vitia'. In **Falzon versus Bonello et (1916) – Volume XXIII.II.82,** the court held:

"Nelle cause di spoglio l'esame della corte deve versare semplicimente sul fatto del possesso, o della detenzione, alla quale la legge estende anche l'azione di spoglio o dello spoglio, ed al convenuto spogliante non è lecito allegare alcun eccezione che non fosse dilatorio, prima di avere reintegrato nel suo possesso, lo spogliato".

This was confirmed in Appeal a year later (Volume XXIII.I.366).

Influenced by Canon Law, **"spoliatus ante omnia restituendus",** where there must first be reintegration of the possessor or detentor with the thing, and it is only after the court order is obeyed that the owner is then allowed to commence the actio manutentionis provided the elements exist (Section 536), or an 'actio petitoria', to prove his right over the thing. Section 532 (2) in fact states:

"Such reinstatement shall be ordered by the court even though the defendant be the owner of the thing of which the plaintiff has been despoiled".

As was upheld in **Vella versus Boldarini,** the court expelled from the records of the case, questions of ownership produced by the defendant that the plaintiff was not the owner. Ownership is therefore irrelevant because the

possessory remedies are limited to the aspect of possession, subject to the proviso mentioned by me as regards possession under the actio manutentionis. In this regard, Galgano says:

"Il convenuto nel giudizio possessorio non può difendersi eccependo di essere il proprietario della cosa: ne può iniziare il giudizio petitorio finche il giudizio possessorio non sia stato definito e la decizione non sia stata eseguita. La ragione del divieto è evidente: il proprietario, che sia stato privato del possesso della cosa, ha tutto il diritto di riottenerlo, ma deve, per realizzare questo risultato, esercitare in giudizio quella opposita azione che è l'azione di rivendicazione, e deve attendere la sentenza che, accertato il suo diritto di proprieta, ordini al possessore di restituirgli la cosa".

The **second element** of the actio manutentionis is that **the subject matter must be either an immovable, corporeal or incorporeal or a universality of movables** as for example a herd. This is one of the divergencies from the actio spolii because the latter is of a wider application as it can be exercised in case of spoliation of whatever kind, whether of an immovable or a moveable thing. This reveals that the actio manutentionis cannot be exercised in respect of particular moveables, as confirmed in **Gauci Forno versus Gravina (1931) – Volume XXVIII.I.188** where the court held:

"Traendo l'azione di manutenzione ..... essendo così un azione reali e non accordata per i casi di turbativa nel possesso di cose mobili che non costituiscono una universalita di mobili".

As regards this element, Sir A. Dingli did not include **"diritti reale"** with immovables as it was then in Italy e.g. usufruct, usus and praedeal easements, because these are already included under the definition of immovables found under Section 310. **"Universalita di mobili"** was adopted from France (Pothier) such as **"eredita di mobili, un fondo di commercio"**, however in this regards Torrente raises an interesting point on the business concern. He says that the actio manutentionis does not apply to the business concern because the universality of movables, as defined in the Italian Code, must be of the same genus and must belong to the same person. The complexity of the goodwill belonging to the business concern does not have the nature of a **res** and therefore the subject matter of a possessory action, **"non ha tuttavia natura di res, suscettibile di formare oggetto di un diritto reale, o di una corrispondente tutela possessoria, nel caso di suiamento o di concorrenza sleale".** The Corte di Cassazione in Italy has agreed to this proposition.

The third element is the Molestation. The possessor must have been molested in his possession either by a molestation of law or by a molestation of fact which must persist. In **Cachia Zammit versus Barbara (1959) – Volume XLIII.II.822** defendant had molested plaintiff by building a room on his land, but which was subsequently demolished. Here, the actio manutentionis was not accepted because the very subject matter of molestation, that is the room, no longer existed. This seems to be similar to Italy where Torrente says:

"Spetta dunque, alla parte, che lamenta di essere stata molestata, di specificare in che cosa consista la molestia sofferta, essendo evidente che la domanda di manutenzione o di remissione in pristino, anche se formulata in termini più ampi, non può essere accolta senza un preciso riferimento alla molestia indicata ed ai suoi effetti preguidizievoli all'esercizio del possesso, che devono appunto essere eliminati da chi se ne sia reso responsabile".

A molestation of law is based on a claim of right of another person contrary to the possessor's possession, whether such allegation is made judicially or extra-judicially and whether the molestor is claiming in his favour or not. A molestation of fact has been interpreted very widely, including also spoliation which is the greatest violation against possession. The meaning of molestation was elaborated upon in **Vella versus Boldarini et** cited before, **"Molestation, whether of fact or of law, always implies the 'contradictio' to possession, of whatever nature. It manifests itself externally in an act, made against the possessor's will, accomplished with the 'animus contrarius'. The molestor acts against the possession, he hinders the possession or changes the enjoyment, without the molestor necessarily affirming for himself a contrary possession".**

This element is not similar to that found under the actio spolii which mentions only violent or clandestine spoliation. In **Mifsud versus Cassar (1943) – Volume XXXI.I.296** the Court of Appeal confirmed this:

"L-azzjoni ta' spoll ..... bażat fuq il-konsiderazzjoni ta' ordni pubbliku illi dak li jiġi spoljat vjolentement, jew klandestinament, għandu jiġi difiż mit-tribunali, u min ikun għamel dak l-ispoll ma jkunx jista' jġib ebda difiża".

As regards the actio manutentionis the court continued:

"Tista' tkun eżerċitata anki f'każ ta' spoll li ma jkunx vjolenti jew klandestin" whereas under the actio spolii, **"dik il-molestija jew spoll trid tkun permezz ta' vjolenza jew klandestinità".**

As to the term 'violence' under the actio spolii, it is enough that violence is exerted on the thing itself. In **Zahra versus Carabott,** mentioned earlier, the Court of Appeal in fact said:

"Sabiex jiġi sodisfatt dan ir-rekwiżit, ma hemmx bżonn il-'vis atro' cioè xi vjolenza fiżika jew morali fuq il-persuna tal-possessur, imma biżżejjed, il-vjolenza fuq il-ħaġa".

Therefore molestation of fact may amount to private force against the will of the possessor, being physical or moral violence against the person of the possessor, or violence against the thing itself such as displacement of boundary marks, or even clandestine spoliation which is carried into effect without the knowledge of the possessor.

However in **Agius versus Gauci (1923) – Volume XXV.II.220,** the court did not accept that a wall built to stop one from passing was a molestation,

because the plaintiff used to be allowed to pass only on tolerance and therefore he could have been stopped any time. This reasoning appears to apply also to the actio spolii as upheld in **Pace versus Cilia (1966):**

M'hemmx pussess ġuridikament reintengrabbli fejn il-vantaġġ gawdent mill-pretiż spoljat jistrieħ fuq is-sempliċi tolleranza tal-pretiż spoljatur ..... jeħtieġ li din it-tolleranza tirriżulta prontament, cioè minħajr il-ħtieġa ta' indaġini inoltrata''.

Torrente says:

''Alla nozione di molestia non è, pertanto, inerente l'esistenza di un danno attuale, essendo sufficiente che lo stato di possesso sia posto in dubbio o in pericolo, perchè il soggetto passivo della molestia sia legittimato a chiedere la tutela possessoria''. Molestation can exist also as between co-possessors where Torrente continues, **''in tema di compossesso si verifica molestia allorchè uno dei compossessori, ampliando la sfera del proprio possesso, renda più incomodo o restringa, a proprio vantaggio, il precedente modo di esercizio del possesso dell'altro o dagli altri compossessori''.**

The will to molest, **l'animus turbandi,** exists in the voluntariness of molesting, that is, with the knowledge that what one is doing is in some way changing the state of fact that exists. Here, Torrente says:

''L'animus turbandi consiste nella volontarietà del fatto, compiuto a detrimento dell'altriu possesso, nella consapevolezza e nella coscienza di contraddire, modificare o limitare l'esercizio del diritto del possessore contro la volontà espressa o presenta di costui. La volontarietà della turbativa, quale elemento essenziale della molestia possessoria, ai fini dell'azione di manutenzione, è normalmente insita nello stesso volontario compimento di un atto che modifichi o alteri lo stato preesistente dell'altrui possesso''.

The last element is the time limit. The period of one year from molestation applicable to the plaintiff to make the action existed also in Roman Law. It is rather short because the protection given by law, of a state of fact may perhaps be contrary to law. After one year, this action cannot be instituted, saving perhaps an action on the merits, the **actio petitoria,** wherein, the plaintiff who was molested has to prove the right claimed by him, that is for example, that he is the owner. Galgano says, **''trascorso l'anno, il possesso si consolida nelle mani dell'autore dello spoglio, e la restituzione della cosa potrà essere ottenuta, con l'azione di rivendicazione, solo da chi si dimostri proprietario''.** Under the actio spolii, the time limit is even more rigid, because it can only be exercised within two months from the spoliation.

The limitation that the plaintiff must have possessed for one year, which exists in France and Italy was not included by Sir A. Dingli, because this did not exist under Roman Law. Torrente says that possession must not have been acquired violently or clandestinely. In such cases, the actio manutentionis can only be exercised after one year from when the violence or clandestinity cease.

This is similar to the presumption under Section 527 with the exception of the applicability of the one year duration of possession. As regards repeated molestations Torrente, quoting from a court judgment says, **"in presenza di più atti successivi di turbativa, il termine di un anno per la proposizione dell'azione di manutenzione deve essere computato dall'atto iniziale, se si tratti di atti collegati obiettivamente tra loro, mentre computato dall'ultimo, quando le turbative siano discontinue ed autonome".**

Although Section 534 says, **"demand that his possession be retained",** the purpose of the actio manutentionis is both of a conservative function, and also of a recuperative function, in either bringing the molestation to an end if the molested person is still in possession or in giving back to him that possession of which he has been deprived. A characteristic common to possessory actions is that they all tend to obtain the maintenance of a 'status quo' to protect public order. They are a sort of a transitory judgment, paving the way for a definitive judgment in favour of the owner when he exercises his rights under the actiones petitoriae. Questions of ownership or other rights are not prejudiced, so that possessory actions have the effect of defining the position of the parties in an actio petitoria in which the plaintiff is the one who lost the possession, in such a way that the **onus probandi** rests on him, to prove his rights. I will conclude by quoting Galgano:

"Nei confronti del proprietario, la protezione del possessorio è solo provvisoria: vinto il giudizio possessario e ottenuta la restituzione della cosa, il possessore soccomberà nel successivo giudizio petitorio, e dovrà definittivamente consegnarla al proprietario".

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